

Administration of Barack Obama, 2012

Directive on Procedures Implementing Section 1022 of the National Defense Authorization Act for Fiscal Year 2012

February 28, 2012

Presidential Policy Directive / PPD-14

Subject: Procedures Implementing Section 1022 of the National Defense Authorization Act for Fiscal Year (FY) 2012

The executive branch must utilize all elements of national power—including military, intelligence, law enforcement, diplomatic, and economic tools—to effectively confront the threat posed by al-Qa'ida and its associated forces, and must retain the flexibility to determine how to apply those tools to the unique facts and circumstances we face in confronting this diverse and evolving threat.

Under the Authorization for Use of Military Force of September 18, 2001 (Public Law 107-40)(2001 AUMF), the executive branch has the authority to detain in military custody individuals who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for the September 11 attacks, as well as individuals who are part of or substantially supported Taliban or al-Qa'ida forces or associated forces that are engaged in hostilities against the United States or its coalition partners. Section 1021 of the National Defense Authorization Act for FY 2012 (Public Law 112-81)(NDAA) affirms that authority.

A rigid, inflexible requirement to place suspected terrorists into military custody would undermine the national security interests of the United States, compromising our ability to collect intelligence and to incapacitate dangerous individuals. This Directive specifies policies and procedures designed to ensure that section 1022 of the NDAA is implemented in a manner that is consistent with the national security and foreign policy interests of the United States. Specifically, this Directive sets forth the procedures required by section 1022 of the NDAA for determining when the military custody requirement of section 1022 applies to non-citizens detained by the United States, when and how any such determination will be implemented, and when and how to waive the requirements of section 1022(a)(1) when it is in the national security interests of the United States. This Directive also issues several national security waivers.

I. SCOPE OF PROCEDURES AND STANDARD FOR COVERED PERSON DETERMINATIONS

A. Scope of Procedures. Subject to sections I(B) through I(F), the procedures set out in sections II through V of this Directive apply only when (1) an individual is arrested or otherwise taken into custody by the Federal Bureau of Investigation (FBI) or another Federal law enforcement agency on or after the date of this Directive; and (2) officials of the agency detaining the individual have probable cause to believe that the individual is a "Covered Person" under section 1022 of the NDAA.

B. Covered Persons. For purposes of this Directive, the phrase "Covered Person" applies only to a person who is not a citizen of the United States and:

1. whose detention is authorized under the 2001 AUMF, as informed by the laws of war, and affirmed in section 1021 of the NDAA; and
2. (a) who is a member of, or part of, al-Qa'ida or an associated force that acts in coordination with or pursuant to the direction of al-Qa'ida; and (b) who participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners.

C. Attack or Attempted Attack.

1. An "attack" means the completion of an act of violence or the use of force that involves serious risk to human life.
2. An "attempted attack" means an overt act or acts beyond a substantial step when (a) performed with specific intent to commit an attack; and (b) no further step or act by the individual would be necessary to complete the attack.

D. Application to Individuals Captured or Detained by, or in the Custody of, the Department of Defense. Any time an individual is captured or detained by, or otherwise taken into the custody of, the Department of Defense, the requirement under section 1022(a)(1) of the NDAA will have been satisfied, regardless of whether there has been a final determination as to whether the individual is a Covered Person, and regardless of the authorities under which the individual is captured, detained, or otherwise taken into custody. Therefore, individuals captured or detained by, or otherwise taken into the custody of, the Department of Defense shall not be subject to the procedures outlined in sections II through IV of this Directive. Any subsequent law of war disposition of the individual effectuated by the Department of Defense consistent with section 1021(c) and 1022(a)(3) of the NDAA satisfies all requirements of section 1022 of the NDAA, subject to the conditions on transfer in section 1028 for any individual detained at Guantanamo.

E. No Effect on Individuals Held by State or Local Authorities. The requirement in section 1022(a) of the NDAA does not apply to individuals arrested by, or otherwise taken into the custody of, State or local law enforcement agencies, and the procedures and requirements set out in this Directive shall not apply while individuals are held in the custody of State or local law enforcement agencies.

F. No Effect on Individuals Held by Foreign Governments. The requirement in section 1022(a) of the NDAA does not apply to individuals who are arrested by, or otherwise taken into the custody of, a foreign government, and the procedures and requirements set out in this Directive shall not apply to individuals held in the custody of foreign governments, including but not limited to circumstances where intelligence, law enforcement, or other officials of the United States are granted access to an individual who remains in the custody of a foreign government.

II. WAIVERS TO PROTECT NATIONAL SECURITY INTERESTS

A. Statutory Authority under NDAA. Section 1022(a)(4) of the NDAA authorizes the President to waive application of the military custody requirement under section 1022(a)(1) where doing so is "in the national security interests of the United States." Such waivers ("National Security Waivers") apply to the requirements of section 1022 of the NDAA.

B. Protection of U.S. National Security Interests. In accordance with section 1022(a)(4) of the NDAA, and consistent with section 1022(c)(2), which provides the executive branch with broad discretion to design implementing procedures to ensure that the requirements of section

1022 do not interfere with various authorities necessary to disrupt or respond to terrorism threats, and to ensure that counterterrorism professionals have clear guidance and appropriate tools at their disposal to accomplish their mission effectively, I hereby waive the requirements of section 1022(a)(1), regardless of whether an individual has yet been determined to be a Covered Person, and certify that it is in the national security interests of the United States to do so, when:

1. placing a foreign country's nationals or residents in U.S. military custody will impede counterterrorism cooperation, including but not limited to sharing intelligence or providing other cooperation or assistance to the United States in investigations or prosecutions of suspected terrorists;
2. a foreign government indicates that it will not extradite or consent to the transfer of individuals to the United States if such individuals may be placed in military custody;
3. an individual is a lawful permanent resident of the United States who is arrested inside the United States or is arrested by a Federal agency on the basis of conduct taking place in the United States, to the extent the individual is subject to the requirement of section 1022(a)(1);
4. an individual has been arrested by a Federal agency in the United States on charges other than terrorism offenses (unless such individual is subsequently charged with one or more terrorism offenses and held in Federal custody in connection with those offenses);
5. an individual has been arrested by State or local law enforcement, pursuant to State or local authority, and is transferred to Federal custody;
6. transferring an individual to U.S. military custody could interfere with efforts to secure an individual's cooperation or confession; or
7. transferring an individual to U.S. military custody could interfere with efforts to conduct joint trials with co-defendants who are ineligible for U.S. military custody or as to whom a determination has already been made to proceed with a prosecution in a Federal or State court.

C. Authority to Issue Additional Categorical National Security Waivers. The Attorney General, in consultation with other senior national security officials, shall have authority to waive the requirements of section 1022(a)(1) of the NDAA in the national security interests of the United States for categories of conduct or categories of individuals consistent with section 1022(a)(4).

D. Authority to Issue Individual National Security Waivers. The Attorney General, in consultation with other senior national security officials, shall have the authority to waive the requirements of section 1022(a)(1) of the NDAA in the national security interests of the United States on an individual, case-by-case basis, consistent with section 1022(a)(4). A decision to issue such a waiver shall take into account factors such as: the legal and evidentiary strength of any criminal charges that may be brought against the individual; the likely punishment if convicted; the impact on intelligence collection of maintaining the individual in law enforcement custody; the legal and investigative risks posed by a transfer to U.S. military custody; the effect any transfer to U.S. military custody would likely have on cooperation by the individual in custody; the effect any transfer to U.S. military custody would likely have on cooperation by foreign governments in a particular investigation or related investigations; the

risk associated with litigation concerning the legal authority to detain the individual pursuant to the 2001 AUMF, as informed by the laws of war; and the need to preserve a long-term disposition of the individual that adequately mitigates the threat the individual poses and protects the national security interests of the United States. A waiver is also appropriate if the Attorney General determines, in consultation with other senior national security officials, that a prosecution of the individual in Federal, State, or a foreign court will best protect the national security interests of the United States. The Attorney General may delegate this authority to any appropriate subordinate officials of the Department of Justice who hold positions for which Senate confirmation is required.

E. Timing and Effect of National Security Waiver Determination. The Attorney General shall have the authority to issue a National Security Waiver at any time, including before a determination is made that an individual is a Covered Person. If the Attorney General issues a National Security Waiver or determines that an existing National Security Waiver applies, no determination whether an individual is a Covered Person is required.

III. LAW ENFORCEMENT ARRESTS OF INDIVIDUALS BELIEVED TO BE COVERED PERSONS

A. Notice to Attorney General of Arrests of Proposed Covered Persons. As soon as is practicable after the FBI or another Federal law enforcement agency arrests or otherwise takes into custody a person it has probable cause to believe is a Covered Person under section I(B) of this Directive, the arresting agency shall notify the Attorney General that it has arrested or taken into custody such a person. The arresting agency may also submit to the Attorney General its views as to whether a National Security Waiver applies or would be appropriate.

B. Screening. For each individual in custody about whom the Attorney General has been notified in accordance with paragraph (A), a screening shall commence as soon as practicable after sufficient information is available, in the estimation of the Attorney General, to establish that probable cause exists to believe that the individual is a Covered Person and that the individual is not currently subject to a National Security Waiver. In the event the Attorney General determines that there is not probable cause to believe that the individual is a Covered Person or determines that the individual is subject to an existing National Security Waiver, no further action shall be required under section 1022 or this Directive.

C. Process for Making Covered Person Determinations.

1. Where the Attorney General determines that there is sufficient information to establish probable cause to believe that the individual is a Covered Person and that the individual is not subject to an existing National Security Waiver, the Attorney General, in coordination with other senior national security officials, shall be responsible for determining whether the individual is a Covered Person for purposes of section 1022(a) of the NDAA. In consultation with other senior national security officials, the Attorney General is authorized to issue further implementing guidelines as necessary to ensure that Covered Person determinations are made efficiently, accommodate the operational concerns of all relevant departments and agencies of the Federal Government, and are consistent with the NDAA and the requirements in section III(C) of this Directive.
2. The Attorney General, in coordination with other senior national security officials, shall, to the extent reasonably practicable, review information in the possession of the United States Government relevant to determining whether the individual is a

Covered Person under section I(B) of this Directive, as well as whether the individual is subject to a National Security Waiver under section II(B) or II(C) or whether a separate National Security Waiver should be issued under section II(D). Such information shall include available information from the Department of Homeland Security and other agencies as to the citizenship and/or immigration status of the individual. All relevant departments and agencies shall assist the Attorney General in collecting the information required for determining whether an individual is a Covered Person or is or should be subject to a National Security Waiver.

3. On the basis of the information reviewed, the Attorney General, in coordination with other senior national security officials, shall determine whether there is clear and convincing evidence that the individual is a Covered Person under section 1022 of the NDAA.

a. No further action shall be required under section 1022(a)(1) of the NDAA or the procedures set out in this Directive if the Attorney General, in coordination with other senior national security officials,

- i. determines that there is not clear and convincing evidence that such individual is a Covered Person;
- ii. determines that such individual is subject to a categorical National Security Waiver specified in section II(B) or issued pursuant to section II(C) of this Directive; or
- iii. issues an individual National Security Waiver under section II(D) of this Directive.

D. Final Determinations. If the Attorney General, with the concurrence of the Secretary of State, the Secretary of Defense, Chairman of the Joint Chiefs of Staff, the Secretary of Homeland Security, and the Director of National Intelligence, concludes that there is clear and convincing evidence that such individual is a Covered Person, that the individual is not subject to an existing National Security Waiver, and that a National Security Waiver with respect to that individual should not be issued, then the Attorney General shall make a final determination that the individual is a Covered Person and provide notice of that final determination to other senior national security officials.

E. Effect of National Security Waiver. As provided in section II(E) of this Directive, nothing in this Directive precludes the Attorney General, in consultation with other senior national security officials, from issuing a National Security Waiver at any time. Once such a waiver is issued, the Covered Person determination process for an individual covered by that waiver shall cease, and no further action shall be required under section 1022 or this Directive.

F. Effect of Covered Person Determination. A determination that an individual is a Covered Person not subject to a National Security Waiver shall be without prejudice to that individual's appropriate disposition under the law of war in accordance with sections 1021(c) and 1022(a)(3) of the NDAA, the national security and foreign policy interests of the United States, and the interests of justice.

IV. IMPLEMENTATION OF COVERED PERSON DETERMINATIONS

The FBI or any other Federal law enforcement agency that has taken a Covered Person into custody shall, in consultation with the Attorney General and the Secretary of Defense, ensure that any transfer to U.S. military custody occasioned by a Covered Person

determination does not result in the interruption of any ongoing interrogation, the compromise of any national security investigation, or the interruption of any ongoing surveillance or intelligence gathering with regard to persons not already in the custody or control of the United States. In no event may a Covered Person arrested in the United States or taken into the custody of the United States by the FBI (or any other Federal law enforcement agency) be transferred to military custody unless and until the Director of the FBI or his designee has determined such a transfer will not interrupt any ongoing interrogation, compromise any national security investigation, or interrupt any ongoing surveillance or intelligence gathering with regard to persons not already in the custody or control of the United States, consistent with section 1022(c)(2)(B) of the NDAA. For these purposes, and to ensure that vital intelligence is not lost, an "interrogation" is not limited to a single interview session and extends until the interrogating agency or agencies determine that all necessary intelligence gathering efforts have been exhausted.

V. NO ABRIDGMENT OF DOMESTIC LAW ENFORCEMENT

The agency with custody of the proposed Covered Person shall continue to operate in accordance with the agency's standard authorities and practices and consistent with applicable law, unless and until (1) the Attorney General, in coordination with other senior national security officials, makes a final determination that the individual is a Covered Person not subject to a National Security Waiver; (2) the Attorney General provides notice of that determination to other senior national security officials, including the head of the department or agency with custody of the proposed Covered Person; and (3) the Attorney General and the Secretary of Defense, in consultation with other senior national security officials, determine that the individual can safely and securely be transferred to the custody or control of the United States Armed Forces, consistent with applicable laws, including the law of armed conflict, and all applicable Department of Defense policies and procedures. After a Covered Person determination is made and implemented, the Department of Justice and the FBI shall retain lead responsibility for coordinating the investigation, including interrogation, while the Covered Person is held in military custody pending disposition under the law of war.

Nothing in the NDAA nor in this Directive alters the existing law enforcement and national security authorities of the Department of Justice, the FBI, or other Federal law enforcement agencies. In particular, nothing in this Directive shall be construed to affect the existing law enforcement and national security authorities of the FBI or any other law enforcement agency with regard to a Covered Person (or proposed Covered Person), regardless of whether such person is held in U.S. military custody. The FBI continues to have lead responsibility for investigations of terrorist acts or terrorist threats by individuals or groups within the United States, as well as for related intelligence collection activities within the United States.

VI. DISPOSITION DETERMINATIONS

In the event that an individual is determined to be a Covered Person not subject to a National Security Waiver, relevant departments and agencies shall determine the individual's disposition under the law of war.

VII. GENERAL PROVISIONS

This Directive shall be implemented consistent with the Constitution and other applicable law including: the Convention Against Torture; Common Article 3 of the Geneva Conventions;

the Detainee Treatment Act of 2005; and other laws and Executive Orders relating to the transfer, treatment, and interrogation of individuals detained in an armed conflict.

Any determination that there is not clear and convincing evidence that an individual is a Covered Person shall be without prejudice to the question of whether the individual may be subject to detention under the 2001 AUMF, as informed by the laws of war, and affirmed by section 1021 of the NDAA. Nothing in this Directive is intended to affect or alter the jurisdiction of Federal courts to determine the legality of detention or the substantive or procedural standards that apply to such determinations.

The procedures set out in this Directive are not designed to resolve legal issues with respect to the detention by the United States of any Covered Person or individual proposed to be a Covered Person. If, at any time, material information calls into question the legality of an individual's detention, the matter shall be referred to the Attorney General for appropriate action, consistent with this Directive.

For purposes of this Directive, the phrase "senior national security officials" includes the Secretary of State, Secretary of Defense, Attorney General, Secretary of Homeland Security, Chairman of the Joint Chiefs of Staff, Director of National Intelligence, Director of the FBI, and Director of the Central Intelligence Agency, as well as any other official I designate. Such officials may delegate their responsibilities under this Directive to appropriate subordinate officials.

This Directive is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

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